

1 THE HONORABLE JAMES L. ROBART
2
3
4
5
6
7
8
9

10 **UNITED STATES DISTRICT COURT**
11 **WESTERN DISTRICT OF WASHINGTON**
12 **AT SEATTLE**

13 CALIFORNIA EXPANDED METAL
14 PRODUCTS COMPANY, et al.

15 No. 2:18-cv-00659-JLR

16 Plaintiffs,

17 **[MODIFIED MODEL] AGREEMENT**
18 **REGARDING DISCOVERY OF**
19 **ELECTRONICALLY STORED**
20 **INFORMATION AND [PROPOSED]**
21 **ORDER**

22 vs.

23 JAMES KLEIN, et al.

24 Defendants.

1 The parties hereby stipulate to the following provisions regarding the discovery of
2 electronically stored information ("ESI") in this matter:

3 **A. General Principles**

4 1. An attorney's zealous representation of a client is not compromised by conducting discovery
5 in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating
6 and reasonably limiting discovery requests and responses raises litigation costs and contributes to

7 the risk of sanctions.

8 2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in
9 each case when formulating a discovery plan. To further the application of the proportionality
10 standard in discovery, requests for production of ESI and related responses should be reasonably
11 targeted, clear, and as specific as possible.

12 **B. ESI Disclosures**

13 Within 30 days after the Rule 26(f) conference, or at a later time if agreed to by the parties,
14 each party shall disclose:

15 1. Custodians. The five custodians most likely to have discoverable ESI in their possession,
16 custody or control. The custodians shall be identified by name, title, connection to the instant
17 litigation, and the type of the information under his/her control.

18 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives,
19 servers, etc.), if any, likely to contain discoverable ESI.

20 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
21 discoverable ESI (e.g. third-party email and/or mobile device providers, "cloud" storage, etc.)
22 and, for each such source, the extent to which a party is (or is not) able to preserve information
23 stored in the third-party data source.

24 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
25 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
26 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

1 **C. Preservation of ESI**

2 The parties acknowledge that they have a common law obligation to take reasonable and
3 proportional steps to preserve discoverable information in the party's possession, custody or
4 control. With respect to preservation of ESI, the parties agree as follows:

5 1. Absent a showing of good cause by the requesting party, the parties shall not be required
6 to modify the procedures used by them in the ordinary course of business to back-up and archive
7 data; provided, however, that the parties shall preserve all discoverable ESI in their possession,
8 custody or control.

9 2. All parties shall supplement their disclosures in accordance with Rule 26(e) with
10 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that
11 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-
12 (2) below).

13 3. Absent a showing of good cause by the requesting party, the following categories of
14 ESI need not be preserved:

- 15 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 16 b. Random access memory (RAM), temporary files, or other ephemeral data that
17 are difficult to preserve without disabling the operating system.
- 18 c. On-line access data such as temporary internet files, history, cache, cookies, and the
19 like.
- 20 d. Data in metadata fields that are frequently updated automatically, such as last-
21 opened dates (see also Section (E)(5)).
- 22 e. Back-up data that are substantially duplicative of data that are more accessible
23 elsewhere.
- 24 f. Server, system or network logs.
- 25 g. Data remaining from systems no longer in use that is unintelligible on the systems
26 in use.
- h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from
mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that
a copy of all such electronic data is routinely saved elsewhere (such as on a server,
laptop, desktop computer, or "cloud" storage).

26 **D. Privilege**

1. With respect to privileged or work-product information generated after the filing of the
2 complaint on January 10, 2018, parties are not required to include any such information in privilege
3 logs.
4. Activities undertaken in compliance with the duty to preserve information are protected
5 from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).
6. Information produced in discovery that is protected as privileged or work product shall be
7 immediately returned to the producing party, and its production shall not constitute a waiver of
8 such protection, if: (i) such information appears on its face to have been inadvertently produced or
9 (ii) the producing party provides notice within 15 days of discovery by the producing party of the
10 inadvertent production.

11 **E. ESI Discovery Procedures**

12 1. On-site inspection of electronic media. Such an inspection shall not be permitted
13 absent a demonstration by the requesting party of specific need and good cause or by agreement
14 of the parties.

15 2. Search methodology. The parties shall timely attempt to reach agreement on
16 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
17 any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness
18 of the search terms or computer- or technology-aided methodology.

19 In the absence of agreement on appropriate search terms, or an appropriate computer- or
20 technology-aided methodology, the following procedures shall apply:

21 a. A producing party shall disclose the search terms or queries, if any, and
22 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
23 parties shall meet and confer to attempt to reach an agreement on the producing party's search
24 terms and/or other methodology.

25 b. If search terms or queries are used to locate ESI likely to contain
26 discoverable information, a requesting party is entitled to no more than 5 additional terms or

1 queries to be used in connection with further electronic searches absent a showing of good cause
2 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
3 requesting party within 14 days of receipt of the producing party's production.

4 c. Focused terms and queries should be endeavored to be employed.
5 Absent a showing of good cause, each search term or query returning more than 250 megabytes
6 of data are presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio
7 files, and similarly large file types.

8 d. The producing party shall search both non-custodial data sources and ESI
9 maintained by the custodians identified above.

10 3. Format. The parties agree that ESI will be produced to the requesting party with
11 searchable text, in a format to be decided between the parties. Acceptable formats include, but are
12 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),
13 single-page TIFFs (only with load files for e-discovery software that includes metadata fields
14 identifying natural document breaks and also includes companion OCR and/or extracted text files),
15 and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily converted
16 to image format, such as spreadsheet, database and drawing files, should be produced in native
17 format.

18 4. De-duplication. The parties may de-duplicate their ESI production across custodial
19 and non-custodial data sources after disclosure to the requesting party.

20 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only
21 the following metadata fields need be produced: document type; custodian and duplicate
22 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file path;
23 date and time created, sent, modified and/or received; and hash value.

24

25

26 ////

1 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.
2
3 by

4 Nov. 19, 2018

/s/ R. Joseph Trojan

R. Joseph Trojan (*pro hac vice*)
TROJAN LAW OFFICES
9250 Wilshire Blvd.
Beverly Hills, CA
Attorney for Plaintiff,
CALIFORNIA EXPANDED METAL PRODUCTS
COMPANY

9 Nov. 19, 2018

/s/ Brian Bodine

Brian Bodine (WSBA No. 22414)
LANE POWELL PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98111
Telephone: 206-223-7000
Attorney for Plaintiff,
CALIFORNIA EXPANDED METAL PRODUCTS
COMPANY

15 Nov. 19, 2018

/s/ Ann G. Schoen

Ann G. Schoen (*pro hac vice*)
FROST BROWN TODD LLC
301 East Fourth Street, Suite 3300
Cincinnati, OH 45202
Telephone: 513-651-6128
Attorney for Plaintiff,
CLARKWESTERN DIETRICH BUILDING
SYSTEMS LLC

21 Nov. 19, 2018

/s/ Robert J. Carlson

Robert J. Carlson (WSBA No. 18455)
LEE & HAYES PLLC
701 Pike Street, Suite 1600
Seattle, WA 98101
Telephone: 206-876-6029
Attorney for Plaintiff,
CLARKWESTERN DIETRICH BUILDING
SYSTEMS LLC

1
2 Nov. 19, 2018

/s/ Patrick C. Bageant

Patrick C. Bageant (WSBA No. 44268)
3 HOLLYSTONE LAW
4 1775 West State St., #286
Boise, ID 83702
5 Telephone: 208-596-5343

6 Thomas E. Loop (No. 27546)
7 LOOP INTELLECTUAL PROPERTY LAW
1700 Seventh Avenue, Suite 2100
8 Seattle, WA 98101
Telephone: 206-568-3100

9 Thomas J. Lloyd, III
10 ELAM & BURKE, P.A.
11 251 E. Front St.,
12 Suite 300 P.O. Box 1539
Boise, ID 83701
13 Telephone: 208-343-5454

14 Attorneys for Defendants,
JAMES KLEIN, et al.

15
16
17
18
19
20
21
22
23
24
25
26

////

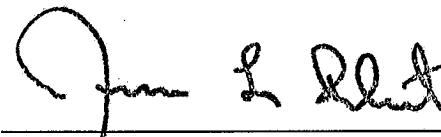
Agreement Re Discovery of ESI
CASE No. 2:18-cv-00659-JLR

TROJAN LAW OFFICES
9250 Wilshire Blvd., Suite 325
Beverly Hills, CA 90212
Telephone: (310) 777-8399 Fax: (310) 691-1086

1
2 **[PROPOSED] ORDER**
3

4 Based on the foregoing, IT IS SO ORDERED.
5
6
7
8

9 DATED: November 20, 2018
10
11



12 The Honorable James L. Robart
13 UNITED STATES DISTRICT JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26

0121667.0656744 4816-7540-3366v2

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November 2018, I caused to have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

tjl@elamburke.com
thomas@seattlepatentlaw.com
pbageant@hollystonelaw.com
bob@leehayes.com
bodineb@lanepowell.com
JKersting@fbtlaw.com
ASchoen@fbtlaw.com

TROJAN LAW OFFICES

by

/s/ R. Joseph Trojan
R. Joseph Trojan (*pro hac vice*)
9250 Wilshire Blvd.
Beverly Hills, CA
Attorney for Plaintiff,
CALIFORNIA EXPANDED
METAL PRODUCTS COMPANY